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ACTIVITIES RELATING TO SPECIFIC PROVISIONS OF THE SET

(b) Information and consultation on restrictive business practices

CHECK-LISTS FOR INFORMATION AND CONSULTATIONS AND DIRECTORY OF RBP CONTROL AUTHORITIES

Note by the UNCTAD secretariat

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INTRODUCTION

1. With respect to item 4 (b) - Information and consultations, the Intergovernmental Group of Experts on Restrictive Business Practices, at its eleventh session, agreed 1/ that the secretariat should:

(i) Revise the check-lists contained in document TD/B/RBP/78/Rev.1, taking into account the comments made during the current session of the Group and comments received from member States before the end of January 1993;

(ii) Prepare and circulate an updated directory on competition authorities; and

(iii) Improve the dissemination of information on RBPs in goods and services through its annual and quarterly reports and keep other bodies of UNCTAD informed as appropriate.

Accordingly, Part I of this note contains a revised version of the check-list for information and consultations; and Part II contains a revised directory on competition authorities. With respect to (iii), the annual and quarterly reports are published in separate publications.

Part I

CHECK-LISTS FOR REQUESTS FOR INFORMATION AND CONSULTATIONS

2. The attached check-lists for requests for information and for consultations are simply check-lists of points States might wish to use in their requests in order to facilitate exchanges of information and consultation procedures as provided for in paragraph F.4 of the Set of Principles and Rules. States are in no way bound to use such lists, nor to complete every section indicated below. In many cases, a single telephone call or fax should be sufficient and just as effective in obtaining the information or consultation required. It should be noted, however, that the need for confidentiality may frequently prevent or restrict disclosures by competition agencies of much of the information they collect.

A. Requests for information

3. The Set of Multilaterally Agreed Equitable Principles and Rules has emphasized the importance of the exchange of information, as demonstrated by its provisions dealing with information collection and dissemination. 2/ The importance of information in the area of restrictive business practices was further recognized by UNCTAD VII which, in its Final Act, 3/ recommended that UNCTAD's work in restrictive business practices "should continue and be strengthened, particularly with a view to ensuring transparency". Again, in the Cartagena Commitment, UNCTAD VIII agreed, inter alia, that efforts should be made by national Governments or regional authorities to implement fully the Set and to develop cooperation between national competition authorities, including competent authorities of regional groupings. 4/ This was further reflected in the resolution adopted by the Second United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, 26 November-7 December 1990). 5/ In paragraph 4 of that resolution, the Second Review Conference considered that "in the light of States' need for information, a list of restrictive business practices authorities through which requests for information should be channelled is a useful device for increasing the flow of information", and requested "the Secretary-General of UNCTAD to issue a directory of restrictive business practices authorities and to update it regularly". Accordingly, part II of this note contains an updated list of addresses of restrictive business practices control authorities.

4. In paragraph 5 of the resolution, the Second Review Conference considered further "that it would be helpful for States requesting information to have guidance" and requested the Secretary-General of UNCTAD: "to prepare an indicative check-list of items which may include, inter alia:

(a) A description of the restrictive business case in question;

(b) The enterprises involved;

(c) The legal basis for instituting proceedings;

(d) The reasons for requesting the information;

(e) The specific information sought;

(f) The intended use of the information."

Accordingly, this section contains an annotated check-list of items for the guidance of States wishing to request information from other States.

5. In order to improve the implementation of the Set with regard to consultations, the Second Review Conference also requested the UNCTAD secretariat "to prepare a check-list of possible steps which countries may wish to follow in the preparation of a case, and in their request for consultation. Such a check-list could include, inter alia, explaining the reasons for the request for consultations, and indicating the specific details of the behaviour or activity about which the consultation is requested" (para. 7 of the resolution).

6. Accordingly, section B of part I of this note contains an annotated check-list for consultations, including a commentary thereon. It elaborates on the actual situation with information and consultations on restrictive business practices, and suggests some possible improvements which may be achieved in this area, once a majority of States has adopted restrictive business practices control legislation and competition policies have become fully implemented at the international level.

7. In order to ease the flow of information on restrictive business practices between States, the check-list must be clear and precise so as to facilitate the formulation of requests in terms that are as specific as possible and to reduce any risk of misunderstanding between the requesting and the addressed States. To this end, it would seem advisable that the list follow the structure of the Set of Multilaterally Agreed Equitable Principles and Rules and use its terminology, since this text has been agreed multilaterally and adopted as a United Nations instrument. Furthermore, the check-list should be sufficiently detailed so as to reduce the risk that aspects possibly important for the addressed State are not inadvertently omitted in the request. Comprehensiveness implies, of course, that not all items in the check-list are necessarily relevant to each particular case.

8. Conversely, the check-list should not be interpreted as being all inclusive in the sense that no items other than those mentioned may be addressed in a request. When using the check-list, requesting States should also provide any additional information about the case, the reasons for the request, the intended use of the information sought, or any other relevant aspect which they feel might facilitate understanding of, and compliance with, the request. They should also bear in mind that reasons of confidentiality, and legislation to this effect, may prevent or restrict the disclosure by the addressed competition authorities of part of the information they collect.

9. In the check-list which follows, restrictive business practices are simply enumerated. Stating that a request for information concerns, for example, a price-fixing case, in the sense of A.1 (a) (aa), below would not suffice. The case would have to be described in as much detail as necessary for an understanding of its competitive implications. Thus, for instance, time, duration, place, form of agreement or arrangement, whether horizontal or

vertical, etc. would have to be described in detail. The same applies to the other restrictive business practices mentioned under A.1 below.

10. The following check-list is given in a tabulated form for ease of reference, and contains cross references to corresponding parts of the Set of Principles and Rules.

CHECK-LIST FOR REQUESTS FOR INFORMATION

(A) Description of the case

1. Restrictive business practice

(a) Agreement or arrangement (the Set, section D, para. 3)

(aa) Price fixing [Set D.3 (a)]

(bb) Collusive tendering [Set D.3 (b)]

(cc) Market or customer allocation [Set D.3 (c)]

(dd) Quota allocation as to sales and production [Set D.3 (d)]

(ee) Collective action to enforce arrangements [Set D.3 (e)]

(ff) Concerted refusal of supplies to potential importers [Set D.3 (f)]

(gg) Collective denial of access to an arrangement, or association, which is crucial to competition [Set D.3 (g)]

(b) Abuse or acquisition and abuse of a dominant position (Set D.4)

(aa) Predatory behaviour toward competitors [Set D.4 (a)]

(bb) Discriminatory behaviour [Set D.4 (b)]

(cc) Mergers, takeovers, joint ventures or other acquisitions [Set D.4 (c)]

(dd) Fixing the prices at which goods exported can be resold in importing countries [Set D.4 (d)]

(ee) Restrictions on the importation of goods in conjunction with trademarks [Set D.4 (e)]

(ff) Unjustified [Set D.4 (f)]

(i) Partial or complete refusal to deal [Set D.4 (f) (i)]

(ii) Distribution or manufacturing restrictions in conjunction with supply [Set D.4 (f) (ii)]

(iii) Resale or export restrictions [Set D.4 (f) (iii)]

(iv) Tying [Set D.4 (f) (iv)]

2. Enterprises involved

(a) Name, legal form

(b) Location

(c) Business activities

3. Legal basis for instituting proceedings

(a) Applicable substantive rules (explanatory comment as far as necessary);

(b) Applicable rules of procedure (explanatory comment as far as necessary.

(B) Request for information

1. Description of the information sought

(a) Specific facts about which information is sought;

(b) Type of information sought (oral, written, other).

2. Reasons for the request

(a) Relevance of the information sought under the restrictive business practices law of the requesting State;

(b) Other measures, if any, previously or simultaneously taken to obtain the information sought;

(c) Reasons for assuming that the requested information may be available in the addressed State.

3. Intended use of the information sought

(a) Rules of procedure applicable to the use of the requested information;

(b) Specific use intended in the case;

(c) Confidentiality and secrecy laws, and other legal restraints relevant to the use of the requested information in the

requesting State. How far could confidentiality be assured if required by the addressed State?

B. Requests for consultations

11. With regard to consultations, the Set stipulates in Section F.4 the following:

> "(a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;
>
> "(b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time;
>
> "(c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices."

12. The Review Conference emphasized the importance of these provisions and considered that they provided a good basis for consultations. In order to improve their implementation, the UNCTAD secretariat was asked "to prepare a checklist of possible steps which countries may wish to follow in the preparation of a case, and in their request for consultation. Such a check-list could include, inter alia, an explanation of the reasons for the request for consultations, and an indication of the specific details of the behaviour or activity about which the consultation is requested."

13. As provided in section F, paragraph 4 of the Set, consultations may be requested "in regard to an issue concerning control of restricted business practices". Such an issue might be a specific case involving private restraints to competition as included in part A of the indicative check-list for requests for information given below.

14. This was clearly the objective of the Second Review Conference when in paragraph 7 of its resolution it referred to the "preparation of the case" and "details of the behaviour or activity about which the consultation is requested".

15. With respect to the description of the case, much of part A - Description of the case - as contained in the indicative check-list for requests for information under A above is used in the proposed check-list for request for consultations given below.

16. Although requests for consultations in individual cases may be those most likely to play a role in practice, section F, paragraph 4, of the Set clearly covers other situations as well. An "issue concerning the control of restrictive business practices" may also arise in the context of government policies of another State in regard to effects of restrictive business practices at the international level, for instance in conjunction with effects on competition abroad of new legislation, of new enforcement policies, of new enforcement guidelines, or of new trends in court practice.

17. Governments may even find "an issue concerning the control of restrictive business practices" meriting consultation with other States if they contemplate changes in their own legislation or enforcement policies, or if there are relevant changes in the practice of their own courts. If such changes can have an impact on international trade or otherwise touch upon substantial interests of other States, the State concerned may deem appropriate to request consultations on this "issue concerning the control of restrictive business practices" in order to find mutually acceptable solutions at an earlier stage when this appears to be easier than after negative effects on other States have already materialized. This type of request for consultation is elaborated in part B of the check-list for consultations given below.

18. Addressing in the check-list not only issues within the sphere of other States, but also those in a State's own sphere, would thus have the advantage of encouraging countries with broader experience in the enforcement of competition laws and policies, especially developed countries, to take the initiative in avoiding or reducing such conflicts. This aim would also be in line with the general policy objective of the Set to improve international cooperation in the control of restrictive business practices and to prevent or minimize conflict situations in this field.

19. With respect to part C of the check-list, experience has shown in consultations undertaken in international forums, that complex, formalized procedures tend to be counter-productive, preference being given to informal ones. There should be full freedom for the parties in respect of the subject of consultations, their objective and modalities.

20. In the check-list which follows, restrictive business practices are simply enumerated. The reservations discussed in paragraph 9 apply in this case also.

21. The following check-list is given in a tabulated form for ease of reference, and contains a cross reference to corresponding parts of the Set of Principles and Rules.

CHECK-LIST FOR REQUESTS FOR CONSULTATIONS

(A) Request for consultations in a specific case

1. Description of the case

(a) Restrictive business practices

(aa) Agreement or arrangement (the Set, section D, para. 3)

(i) Price fixing [Set D.3 (a)]

(ii) Collusive tendering [Set D.3 (b)]

(iii) Market or customer allocation [Set D.3 (c)]

(iv) Quota allocation as to sales and production [Set D.3 (d)]

(v) Collective action to enforce arrangements [Set D.3 (e)]

(vi) Concerted refusal of supplies to potential importers [Set D.3 (f)]

(vii) Collective denial of access to an arrangement, or association, which is crucial to competition [Set D.3 (g)]

(bb) Abuse or acquisition and abuse of a dominant position (Set D.4)

(i) Predatory behaviour toward competitors [Set D.4 (a)]

(ii) Discriminatory behaviour [Set D.4 (b)]

(iii) Mergers, takeovers, joint ventures or other acquisitions [Set D.4 (c)]

(iv) Fixing the prices at which goods exported can be resold in importing countries [Set D.4 (d)]

(v) Restrictions on the importation of goods in conjunction with trademarks [Set D.4 (e)]

(vi) Unjustified [Set D.4 (f)]

- Partial or complete refusal to deal [Set D.4 (f) (i)]

- Distribution or manufacturing restrictions in conjunction with supply [Set D.4 (f) (ii)]

- Resale or export restrictions [Set D.4 (f) (iii)]

- Tying [Set D.4 (f) (iv)]

(b) Enterprises involved

(aa) Name, legal form

(bb) Location

(cc) Business activities

(c) Legal basis for instituting proceedings

(aa) Applicable substantive rules (explanatory comment as far as necessary)

(bb) Applicable rules of procedure (explanatory comment as far as necessary)

2. Reasons for the request for consultations

(a) Wish to consult about specific restrictive business practices of enterprises located in the addressed State, affecting the requesting State.

(b) Wish to consult about information or evidence needed by the requesting State in a specific case.

(c) Wish to consult about procedural difficulties of the requesting State in conjunction with the service of documents or enforcement measures in a specific case.

(d) Wish to consult about the coordination of enforcement measures in a specific international case, with the aim of finding mutually acceptable enforcement options.

(B) Requests for consultations in other matters

1. Description of the issues in question

(a) Competition legislation or legislation with competitive implications which may have an impact on international trade.

(b) Administrative matters in the field of competition or fields with competitive implications, which may have an impact on international trade.

(c) Court practice in the field of competition or fields with competitive implications which may have an impact on international trade.

2. Reasons for the request for consultations

(a) Legislation

(aa) Wish to consult about adopted or contemplated legislation of the requesting State that does or may have an impact on international trade.

(bb) Wish to consult about adopted or contemplated legislation of the addressed State that does or may have an impact on international trade.

(b) Administration

(aa) Wish to consult about adopted or contemplated administrative measures of the requesting State that do or may have an impact on international trade.

(bb) Wish to consult about adopted or contemplated administrative measures of the addressed State that do or may affect important interests of the requesting State.

(c) Court practice

(aa) Wish to consult about court practice in the requesting State that does or may have an impact on international trade.

(bb) Wish to consult about court practice in the addressed State that does or may affect important interests of the requesting State.

(C) Procedure for consultations

Full freedom is left to the parties as regards the subject of consultations, their objectives, modalities, the participation of third parties, eventual involvement of the Secretary-General of UNCTAD, etc. However, the items on which agreement should be reached before entering into consultations might preferably include the question of how the eventual costs of participating in consultations are to be allocated between the requesting State and the addressed State. Also, with respect to confidentiality of information, while such concerns may frequently prevent disclosure of information, agreement might be reached as to the confidentiality required from the State receiving confidential information.

C. The need for information and consultations

22. As domestic markets are liberated from State regulation and control, the distinction between national and international markets tends to be blurred as capital, manpower goods and services cross frontiers with increasing freedom. The role of the private enterprises in production and trade is growing fast - but so is competition among enterprises. Competition without any appropriate rules of the game leads in time invariably to concentration of market power

and restrictive business practices. It is essential to enforce strong competition policy in order to promote and enhance competition at all levels, domestic and international. This is clearly one of the reasons why a growing number of countries, especially those that have introduced liberalization reforms, are adopting restrictive business practices control legislation. Without such legislation to enhance competition, reduced governmental barriers to trade would soon be replaced by "private" enterprise-level barriers and distortions of all sorts.

23. While markets in many sectors lead towards globalization, national jurisdictions are in many cases limited at the national borders. This means that many States which adopt and enforce restrictive business practices control and legislation will encounter the limits of their control and will have to resort to bilateral and multilateral efforts to resolve issues in the area of restrictive business practices.

24. As recognized by UNCTAD VII, in addition to adopting national restrictive business practices legislation, and provision of appropriate technical assistance therefor, the multilateral issues with respect to restrictive business practices which necessitate immediate action are transparency (i.e. exchange of information) and definition of practicable consultation procedures.

25. The growing number of countries adopting or planning to adopt competition legislation augurs well for the future of multilateral efforts in this area. At present, however, implementation of the Set remains in its infancy with respect to these issues, especially regarding consultations.

26. The check-lists for information and for consultations should be a practical vehicle for States wishing to approach other States concerning issues in the area of restrictive business practices. In this respect, it should be recalled that in line with provision F.4 (a) of the Set, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for consultation.

Notes

1/ For the agreed conclusions of the Intergovernmental Group on Restrictive Business Practices at its eleventh session, see annex I to the report of the eleventh session (TD/B/39(2)7-TD/B/RBP/92).

2/ See, for example, in the Set (TD/RBP/CONF.10/Rev.1), section C, provision 3; section E, provisions 5, 6, 7, 8, 9; section F, provisions 2 and 3.

3/ Final Act of UNCTAD VII (Geneva, 9 July-3 August 1987).

4/ A New Partnership for Development: the Cartagena Commitment, para. 147.

5/ See annex to the Report of the Second United Nations Conference to Review all Aspects of the Set (TD/RBP/CONF.3/9).

Part II

DIRECTORY OF RESTRICTIVE BUSINESS PRACTICES CONTROL AUTHORITIES

27. The following are focal points of restrictive business practices authorities, according to information submitted to UNCTAD by the States concerned:

ARGENTINA

Comisión Nacional de Defensa de la Competencia
Secretaria de comercio Interior
Av. J.A. Roca 651
1322 BUENOS AIRES,
Argentina

AUSTRALIA

Senior Assistant Secretary
Competition Policy Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600
Australia

Director,
United Nations Economic Agencies,
Economic Organization Branch
Department of Foreign Affairs and Trade
PARKES ACT 2600, Australia

Trade Practices Commission
P.O. Box No. 19
BELCONNEN, ACT 2616,
Australia

BELGIUM

Service Politique et Règles de Concurrence
Administration du Commerce
Ministère des Affaires Economiques
rue J.A. De Mot, 24-26
B-1040 BRUXELLES,
Belgique

BRAZIL

Conselho Administrativo de Defesa Economica (CADE)
Ministerio da Justica
Esplanada dos Ministerios
Anexo I
70064 BRASILIA - DF,
Brazil

BULGARIA

Ministry of Foreign Economic Relations
International Organizations Department
12, Sofiiska Komuna Str,
SOFIA 1000, Bulgaria

BRAZIL - Add:

Secretaria Nacional de Direito Economico (SNDE)
Ministério da Justiça
Esplanada dos Ministérios
40 Andar
70064 Brasilia DF,
Brazil

CANADA - New:

Director of Investigation and Research
Bureau of Competition Policy
Consumer and Corporate Affairs Canada
Place du Portage, 21st Floor
50 Victoria Street
Hull, Quebec
Canada, K1YOC8

Tel. (819) 953 42 95
Fax (819) 953 50 13

CZECH REPUBLIC - New:

Český úřad pro hospodářskou soutěž
(The Competition Office of the Czech Republic)
Joštova 8
601 56 - Brno

Tel. 05/23 703
Fax 05/22 036

FINLAND - Add:

Fax 358-0-73 14 33 28

GERMANY - New (add):

The Monopolies Commission
Barbarastr. 1
50735 Köln 60,
Germany

Tel. (0221) 758 11 48
Fax (0221) 758 28 11

Federal Cartel Office
Mehringdamm 129
10965 Berlin, Germany

Tel. (030) 69 58 00
Fax (030) 69 58 04 00;
Telex 184 321

INDIA - New:

Monopolies and Restrictive
Trade Practices Commission
MRTP House
1 Shahjahan Road
New Delhi, 110011,
India

Tel. (011) 385 977

ITALY - New:

Autorita' Garante della Concorrenza
e del Mercato
Via Calabria 48
00187 Roma, Italy

Tel. 39-6-48 16 21
Fax 39-6-48 16 22 56

LITHUANIA - New:

Price and Competition Office
Under Ministry of Economics of Lithuania
Gedimino ave. 38/2
2600 Vilnius
Lithuania

Tel. (3702) 62 77 97, 61 31 57, 62 59 53
Fax (3702) 62 19 04

MEXICO - New:

Federal Competition Commission
(Comisión Federal de Competencia)
(To be established in June 1993)

NETHERLANDS - New:

The Department of Competition Policy
DG Economic Structure
c/o Mr. C van Gent
P.O. Box No. 20101
2500 EC - The Hague,
The Netherlands

Tel. (070) 379 54 43
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NORWAY - New:

Prisdirektoratet
(New name Kondurransetilsynet as from 1 January 1994)
Postbox 8132 Dep.
N - 0033 Oslo 1,
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PERU

Instituto Nacional de Defensa de la Competencia y de la
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SLOVAK REPUBLIC - New:

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821 01 Bratislava

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Paseo de la Castellana, 162
28071 Madrid

Director General: D. Pedro Moriyón Diez-Canedo

Tel. (1) 5 83 51 59
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C/Pio XII, 19
28071 Madrid

Presidente: D. Miguel Angel Fernández Ordoñez

Tel. (1) 3 50 54 00
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SWEDEN - New:

Swedish Competition Authority
Malmskillnadsgatan 32
103 85 Stockholm, Sweden

Director-General: Mr. Jörgen Holgersson

Director of the International Secretariat: Ms. Monica Widegren

Tel. (46 8) - 700 16 00
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Commission fédérale des cartels
Belpstrasse 53
3003 Berne

Président: Prof. Pierre Tercier, Fribourg
Directeur: Dr. B. Schmidhauser

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VENEZUELA - New:

PRO-COMPETENCIA
Superintendencia para la Promoción y Protección
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Torre Este, piso 19, Parque Central
Caracas 1010, Venezuela

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Fiscalía Nacional Económica
Agustinas 853, Piso 12
SANTIAGO DE CHILE, Chile

CHINA

Bureau of Legislative Affairs
State Council of the P.R.C.
P.O. Box 1750
BEIJING-VR
People's Republic of China

Department of International
Relations
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of P.R.C. (MOFERT)
No. 2, Dong Chang An Street
BEIJING, 100731
People's Republic of China

CYPRUS

Ministry of Commerce and
Industry
NICOSIA,
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Norregade 49
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EUROPEAN COMMUNITIES

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200 rue de la Loi
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KENYA

The Commissioner
Monopolies and Prices Commission
Ministry of Finance
P.O. Box 30007
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REPUBLIC OF KOREA

Fair Trade Commission
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NETHERLANDS

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Written information about the activities of the Anti-trust Division of the Department of Justice can be obtained from:

Legal Procedure Office — Tel. (202) 514-2481
Anti-trust Division
Department of Justice
Room 3233 Main
10th and Pennsylvania Avenue, N.W.
WASHINGTON, DC 20530, U.S.A.

Written information about the activities of the Federal Trade Commission can be obtained from:

Public Reference Section — Tel. (202) 326-2222
Federal Trade Commission
WASHINGTON, DC 20580, U.S.A.

Written information about the anti-trust enforcement activities of the various State Attorneys General can be obtained either from the State Attorney-General in question or from the National Association of Attorneys General (NAAG), 444 North Capital Street, N.W., Washington, DC 20001, U.S.A. NAAG's telephone number is (202) 628-0435.